SUPREME COURT, U.S.
FILED
JAN 25 1980
MICHAEL RODAK, JR., CLERK

No. 79-48

In the Supreme Court of the United States

OCTOBER TERM, 1979

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

GLOVER CONSTRUCTION COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 591 F.2d 554. The opinion of the district court (Pet. App. 34a-58a) is reported at 451 F. Supp. 1102.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a) was entered on January 11, 1979, and the Sec-

retary's petition for rehearing was denied on March 12, 1979 (Pet. App. 33a). On May 30, 1979, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including July 10, 1979, and the petition was filed on that date. The petition was granted on November 26, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Buy Indian Act, 25 U.S.C. 47, authorizes the Secretary of the Interior to enter into road construction contracts with Indian-owned companies without publicly advertising pursuant to the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 253.

STATUTES INVOLVED

The Buy Indian Act, 25 U.S.C. 47, provides:

> So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

Section 302 of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 252, provides in pertinent part:

> (a) Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this subchapter and implementing regulations of the Administrator; but this subchapter does not apply—

> (1) to the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration; or
>
> (2) when this subchapter is made inapplicable pursuant to section 474 of title 40 or any other law, but when this subchapter is made inapplicable by any such provision of law, sections 5 and 8 of this title shall be applicable in the absence of authority conferred by statute to procure without advertising or without regard to said section 5 of this title.
>
> * * * * *
>
> (c) All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—
>
> * * * * *
>
> (10) for property or services for which it is impracticable to secure competition;
>
> * * * * *
>
> (15) otherwise authorized by law, except that section 254 of this title shall apply to purchases and contracts made without advertising under this paragraph.
>
> * * * * *
>
> (e) This section shall not be construed to (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items

to be negotiated without advertising as required by section 253 of this title, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraphs (1), (2), (3), (10), (11), (12), or (14) of subsection (c) of this section.

Section 303 of the Act, 41 U.S.C. 253, provides:

Whenever advertising is required—

(a) The advertisement for bids shall be made a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of property and services necessary to meet the requirements of the agency concerned. No advertisement or invitation to bid for the carriage of Government property in other than Government-owned cargo containers shall specify carriage of such property in cargo containers of any stated length, height, or width.

(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided*, That all bids may be rejected when the agency head determines that it is in the public interest so to do.

Section 310 of the Act, 41 U.S.C. 260, provides:

Sections 5, 8, and 13 of this title shall not apply to the procurement of property or services

made by an executive agency pursuant to this subchapter. Any provision of law which authorizes an executive agency (other than an executive agency which is exempted from the provisions of this subchapter by section 252(a) of this title), to procure any property or services without advertising or without regard to said section 5 of this title shall be construed to authorize the procurement of such property or services pursuant to section 252(c)(15) of this title without regard to the advertising requirements of sections 252(c) and 253 of this title.

STATEMENT

1. The Buy Indian Act (the Act), 25 U.S.C. 47,[1] directs the Secretary of the Interior to employ Indian labor "[s]o far as may be practicable," and permits him to purchase "the products of Indian industry * * * [the] open market."[2] The implementing regulations of the Bureau of Indian Affairs (BIA) provide "that all [BIA] purchases or contracts be made or entered into with qualified Indian contractors to the maximum practicable extent." 20 BIAM Bull. 1 (March 3, 1976) App. B, *infra*, 5a-6a;[3] see also 25

[1] The Buy Indian Act is the common name for Section 23 of the Act of June 25, 1910, ch. 431, 36 Stat. 861.

[2] The Secretary has delegated his responsibilities and powers under the Act to the Commissioner of the Bureau of Indian Affairs of the Department of the Interior. See Departmental Manual, Ch. 1, Part 230.

[3] Indian is defined as "a member of an Indian tribe or otherwise considered to be an Indian by the tribe with which affiliation is claimed," and an Indian contractor is an entity that is "100% Indian owned and controlled." *Id.* at 6a. The Bulletin is reprinted as an appendix to this brief (App. B, *infra*, 5a-7a).

C.F.R. 162.5a. Contracts let under these provisions may be awarded by negotiation or by competitive bid restricted to qualified Indian contractors. See 41 C.F.R. 14H-3.215-70; 25 C.F.R. 162.5a; 20 BIAM Bull. 1, App. B, *infra*, 6a-7a.[4] If the contracting officer determines that there are "no qualified Indian contractors within the normal competitive area that can fill or are interested in filling the procurement requirement," then non-Indian contractors may be considered. *Id.* at 6a.

In 1976 and 1977, the local office of the BIA in Muskogee, Oklahoma prepared plans for the repair and improvement of a five-mile segment of road in Pushmataha County, Oklahoma. The road, which is called the Honobia Road, is located within an Indian area subject to BIA regulation. See 23 U.S.C. 101 (a); *Morton* v. *Ruiz*, 415 U.S. 199, 212 (1974). In accordance with the Act and regulations described above, BIA invited three Indian-owned construction companies to submit bids on the Honobia Road project. Respondent, a non-Indian contractor, was not afforded an opportunity to bid. On May 25, 1977 BIA awarded the approximately $1.2 million contract to Indian Nations Construction Company, a

[4] In some circumstances, negotiations must comply with the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203, and regulations thereunder. See 41 C.F.R. 14H-70.000 *et seq.* and 44 Fed. Reg. 62510-62515 (1979). In all cases, the contract price must be "fair and reasonable." 20 BIAM Bull. 1, App. B, *infra*, at 7a.

100% Indian owned and controlled corporation (Pet. App. 2a-3a, 39a).[5]

2. Respondent then instituted this suit in the United States District Court for the Eastern District of Oklahoma, naming as defendants the Secretary of the Interior, the Department of the Interior itself, BIA, and the BIA contracting officer on the Honobia Road project. Relying on 41 U.S.C. 5 and the Federal Property and Administrative Services Act of 1949 (the FPASA), 41 U.S.C. 252, 253, respondent primarily contended that the defendants were

[5] Although irrelevant to the legal issues raised here, we note that respondent has misstated (Br. in Opp. 5-6) the evidence before the district court in several respects. First, Billie W. Crain and James Allen Crain, Seminole Indians, and Nat Marshall, a Choctaw Indian, are the sole owners and directors of Indian Nations (Exhs. A-C to Gov't Motion For Summary Judgment). Hubert Day, a non-Indian, is merely the construction superintendent (Wing Dep. 19-20; Donahoe Dep. 11). Moreover, although the abbreviated record shows that Indian Nations employs at least one non-Indian (Hubert Day), Indian Nations does employ Indians in both management and labor positions (Wing Dep. 10-14, 21-22, 42-44; Donahoe Dep. 8-11).

Respondent also suggests (Br. in Opp. 6) that the use of Indian firms to build roads is undesirable because the first five-mile section of the Honobia Road was built by a non-Indian firm for approximately $500,000, whereas Indian Nations proposed to build the second five-mile segment for approximately $1.2 million. See also Pet. App. 19a. Respondent fails to disclose, however, that the second five-mile portion involved substantially more difficult terrain and that the contract specifications for the second half of the project required twice as thick a road as the first half in order to permit logging operations in that area (Wing. Dep. 31; Donahoe Dep. 46-47; Nordwall Dep. 25-26). The contract price was approved both by the BIA and the Federal Highway Administration.

required to advertise publicly for bids on the Honobia Road project and that the Buy Indian Act does not authorize the unadvertised negotiation of road construction contracts. In addition, respondent asserted that petitioners' actions had denied it due process and equal protection of the laws. Respondent therefore asked the district court to set aside the Honobia Road contract and to enjoin petitioners from invoking the Buy Indian Act to circumvent the bidding requirements of the FPASA in the future.

The district court granted summary judgment for respondent (Pet. App. 34a-58a). The court concluded that 41 U.S.C. 252(c) and 252(e)(B) override the Buy Indian Act and require that the government advertise road construction contracts in accordance with 41 U.S.C. 253.[6] Section 252(c) provides that agency purchases and contracts "shall be made by advertising, as provided in section 253 of this title," unless one of 15 enumerated exceptions is applicable. 41 U.S.C. 252(c). Section 252(e)(B) further states that Section 252 shall not be construed to permit the letting of road and other major construction contracts without advertising "unless negotiation of such contract is authorized by the provisions of paragraphs (1), (2), (3), (10), (11), (12), or (14) of subsection (c) of this section." The court acknowledged (Pet. App. 41a-42a) that the Buy Indian Act fell

[6] The court found that because the FPASA (41 U.S.C. 251 *et seq.*) governed this case, 41 U.S.C. 5 was inapplicable (Pet. App. 39a). In light of its statutory holding, the court declined to address respondent's constitutional arguments (*id.* at 46a-47a).

within exemption 15 as an exception to the public advertising requirement "otherwise authorized by law." See 41 U.S.C. 252(c)(15). It held, however, that because Section 252(e)(B) does not refer to exemption 15, the Buy Indian Act does not authorize the negotiation of road construction contracts. The court rejected the Secretary's contrary administrative construction as inconsistent with the plain language of the FPASA (Pet. App. 42a-46a).[7]

Accordingly, the court, in a final judgment entered on May 12, 1978, declared the road construction contract between BIA and Indian Nations null and void (Pet. App. 49a-58a).[8] Although the court declined to "order [petitioners] to advertise the unperformed balance of the road construction contract" (*id.* at 50a), it permanently enjoined petitioners "from circumventing the advertising requirements of 41 U.S.C. § 253 in connection with future road construction contracts" (Pet. App. 58a).

3. The government appealed and a divided panel of the court of appeals affirmed (Pet. App. 1a-31a). Relying primarily on the analysis of the district court, the court of appeals first indicated that the Buy Indian Act did not relieve the Secretary of the advertising requirements set forth in the FPASA (Pet.

[7] The court observed that in any event the administrative construction was entitled to little deference because it was not contemporaneous with the enactment of the Buy Indian Act (Pet. App. 46a).

[8] The court rejected respondent's request to order Indian Nations to refund the monies previously paid on the contract for work done (Pet. App. 49a-50a, 58a).

App. 7a-13a). The court stated that, in enacting the FPASA, Congress must be deemed to have been "fully cognizant of the Buy-Indian Act of 1910" and that although Congress was "capable of clearly and directly providing the interpretation of the Buy-Indian Act here urged by the Government * * * it did not elect to do so" (Pet. App. 17a). Suggesting that Congress' failure in this regard was "a political question beyond the jurisdiction of the courts," the court refused to " 'fill the gap' by engaging in judicial lawmaking" (*ibid.*).

In addition, the court of appeals held that the Buy Indian Act does not apply to road construction contracts and that therefore this Court's decision in *Morton* v. *Mancari*, 417 U.S. 535 (1974), was inapposite (Pet. App. 13a-15a). The court recognized "that the remedial Buy-Indian Act is to be given a liberal construction in order to effectuate the purpose for which it was enacted" (*id.* at 19a). It nonetheless opined that "it strains the most liberal interpretation to conclude that the Act's preference for purchase of 'Indian supplies' and 'products' applies to a roadway reconstruction project whose contract price, through Indian Construction, is $1,219,481.00" (*ibid.*). Referring to the difference between that contract price and the cost of the initial five miles of roadway (but see note 5, *supra*), the court of appeals further observed "that a primary, significant *remedial* feature of the advertisement and competitive bidding requirements of the Federal Property and Administrative Services Act of 1949 is to obtain the best and

lowest bid for the benefit of the American taxpayers in 'high cost' construction categories" (Pet. App. 19a-20a).

Judge McKay dissented (Pet. App. 21a-31a), arguing that the court had "reache[d] a result hostile to the remedial purposes of the Buy Indian Act" because of rigid adherence "to formalistic rules of statutory construction" (*id.* at 21a). Judge McKay identified "[t]he real issue in this case [as] the extent to which the Buy Indian Act * * * retains vitality in light of the advertising requirements of the Federal Property [and Administrative Services] Act" (*ibid.*). Judge McKay began his analysis by outlining the purpose and history of the Buy Indian Act. He observed that the "Act announces a congressionally approved policy of preferring Indian labor and products and grants the Interior Secretary discretionary power to purchase Indian products in the open market," and that pursuant to that policy the Department of the Interior had established a road construction program that "has provided substantial economic encouragement to Indian construction enterprises" (Pet. App. 22a). He pointed out that "[t]he obvious purpose of the Buy Indian Act is to encourage Indian economic development by freeing Indian industry from the competitive strictures of advertised bidding requirements," and that the legislative history, albeit scanty, "manifests a clear purpose to except purchases of Indian products from advertising requirements" (*ibid.*).

Accordingly, Judge McKay faulted the majority for ignoring the remedial purpose of the Act merely

because nothing in the language or legislative history of the Act specifically refers to road construction work (Pet. App. 25a-26a). He contended (*id.* at 26a-27a) that such a construction might "make the Act applicable to nothing at all" or, at a minimum, would limit the Act to Indian economic activities that were actually being conducted in 1910. As a result, the Buy Indian Act would be relegated "to a role of protecting Indian handicraft and trinket production—economic activities that probably require no preferential treatment at all" (*id.* at 27a). That conclusion, the dissent argued, conflicts with the well-established rule that "statutes passed for the benefit of [Indians] are to be liberally construed, doubtful expressions being resolved in [their] favor" (*ibid.*, quoting *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976)). Judge McKay finally concluded that the teaching of *Morton* v. *Mancari*, *supra*, required the court to "sustain both" the Buy Indian Act and the FPASA "in a way that vitiates neither" (Pet. App. 31a).[9]

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[9] Judge McKay further noted that a blanket injunction was improper because the Secretary might exercise his discretion under 41 U.S.C. 252(c)(10) and conclude that advertised bidding was impracticable in light of the purposes of the Buy Indian Act. See *Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, 477 F.2d 696, 708 (5th Cir. 1973), cert. denied, 415 U.S. 914 (1974). On December 18, 1979, the Commissioner of BIA issued a class determination and finding under 41 U.S.C. 252(c)(10) regarding the impracticability of advertising contracts for supplies and services including construction within BIA's jurisdiction. A copy of this determination is provided in App. C, *infra*, 8a-10a.

SUMMARY OF ARGUMENT

I

The Buy Indian Act empowers the Secretary of the Interior to employ "Indian labor" and to purchase "the products of Indian industry." Although the court of appeals concluded that the Act does not apply to road construction contracts, nothing in the language of the Act suggests such a narrow interpretation. To the contrary, no restrictive modifier limits the scope of "products" and "labor" and there is thus little justification for construing those sweeping terms as covering only traditional Indian industries. Indeed, such a narrow construction violates the well-established principle that remedial statutes such as the Buy Indian Act should be "liberally construed, doubtful expressions being resolved in favor of the Indians." *Wilson* v. *Omaha Indian Tribe*, No. 78-160 (June 20, 1979), slip op. 10; *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918).

In any event, the legislative history reflects that Congress intended the Act to govern a broad range of activities, including construction work. The Act is derived from a long series of Indian appropriations acts between 1886 and 1908. In allocating money for various construction projects, including road construction work, Congress made clear that the Secretary of the Interior was to use Indian labor and products as much as possible. See, *e.g.*, Act of Apr. 30, 1908, ch. 153, 35 Stat. 71. Moreover, the pertinent legislative debates show that Congress an-

ticipated that Indians and their teams would be able to contract for all or part of substantial construction projects. See 42 Cong. Rec. 1695 (1908); 45 Cong. Rec. 6097 (1910).

The court of appeals also failed to defer to a long standing, consistent administrative construction of the Act. The contemporaneous annual reports of the Secretary of the Interior and the Commissioner of Indian Affairs demonstrate that the officials charged with administering the Act unequivocally construed it to cover all ordinary industrial activities, including road building. For example, in 1911, the first year following passage of the Act, the Commissioner reported that he had used Indians "wherever practicable" in "the construction of roads, trails, and telephone lines." *Annual Report of the Commissioner of Indian Affairs* 17 (1911), reprinted in II *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1911.* And more recently, as Indians have established corporate entities, the Secretary has consistently accorded a preference to the products of these corporations. In fact, Congress has been specifically informed of the Secretary's view that the Bureau of Indian Affairs road construction program is subject to the Act and has nonetheless continued to fund that program. See *Department of the Interior and Related Agencies Appropriations for Fiscal Year 1970: Hearings on H.R. 12781 Before a Subcomm. of the Senate Comm. on Appropriations,* 91st Cong., 1st Sess., Part 1, 166, 190-194 (1969).

Finally, we submit that the decision of the court of appeals frustrates the clear congressional purpose that informs the Act. Congress has explicitly recognized that federal assistance such as the Buy Indian Act is critical to the existence of significant Indian industry. The decision of the court of appeals would limit or destroy the effectiveness of the Act; traditional Indian industries like the production of jewelry or trinkets require no protection, whereas fledgling Indian enterprises in more competitive areas such as construction will be—and already have been—forced out of business in the absence of protective legislation.

II

The courts below also erroneously concluded that the Federal Property and Administrative Services Act of 1949, as amended (FPASA), impliedly repealed the Buy Indian Act. In *Morton* v. *Mancari,* 417 U.S. 535, 541-551 (1974), this Court made clear that laws of general application do not abrogate longstanding Indian preference legislation, unless there are affirmative indications that Congress meant to do so. Here, however, the language and legislative history of the statutes in question unequivocally demonstrate that Congress intended to preserve the Buy Indian Act as an exception to general advertising requirements.

As originally enacted, the Buy Indian Act constituted an express exception to the general advertising statute then in existence, Section 3709 of the Revised Statutes. Although Congress has amended both

the Act and Section 3709 from time to time, there is no doubt that the Act still remains an exception to Section 3709. The Act authorizes "open market" purchases of Indian products rather than requiring advertised bidding. Section 3709 in its current form explicitly provides that it does not apply where "otherwise provided [by] * * * other law." 41 U.S.C. 5. And the legislative history makes clear that that language preserves historical exceptions to the advertising laws such as the Buy Indian Act.

Similarly, the language and the legislative history of the FPASA reflect Congress' intent to preserve, not repeal, the Buy Indian Act. Three different sections of the FPASA expressly state that laws such as the Buy Indian Act which authorize the negotiation of government contracts are not subject to the bidding requirements of Section 303 of the FPASA, 41 U.S.C. 253. See 41 U.S.C. 252(a)(2), 252(c)(15), 260. In particular, Section 310 specifies that "[a]ny provision of law which authorizes an executive agency * * * to procure any property or services without advertising or without regard to * * * [section 3709] shall be construed to authorize the procurement of such property * * * without regard to the advertising requirements of [the FPASA]." 41 U.S.C. 260. The congressional reports confirm that all laws that are "exemptions from the requirements of Revised Statutes, section 3709 * * * are preserved [under the FPASA]." H.R. Rep. No. 1166, 89th Cong., 1st Sess. 8 (1965); S. Rep. No. 274, 89th Cong., 1st Sess. 5 (1965).

Respondent's reliance on Section 302(e) of the FPASA, 41 U.S.C. 252(e) is simply misplaced. That provision establishes only that less than all of the advertising exemptions created by the FPASA in Section 302(c) apply to major construction, including road building. Here, however, the road construction contract was negotiated pursuant to the Buy Indian Act and not Section 302(c). Accordingly, Section 302(e) is inapposite. As the pertinent legislative reports point out, Section 302(e) "does not authorize or change the existing requirements for authorization for the erection or repair of buildings, roads, sidewalks, or similar items." H.R. Rep. No. 670, 81st Cong., 1st Sess. 23 (1949); S. Rep. No. 338, 81st Cong., 1st Sess. 20 (1949); S. Rep. No. 475, 81st Cong., 1st Sess. 25 (1949).

ARGUMENT

I. THE BUY INDIAN ACT EMPOWERS THE SECRETARY OF THE INTERIOR TO MAKE PREFERENTIAL PURCHASES ON THE OPEN MARKET OF ALL INDIAN PRODUCTS AND SERVICES, INCLUDING ROAD CONSTRUCTION WORK

A. Road Construction Constitutes A Product Of Indian Industry And Labor Within The Meaning Of The Buy Indian Act

It is axiomatic that "[t]he starting point in every case involving the construction of a statute is the language itself." *Southeastern Community College* v. *Davis*, No. 78-711 (June 11, 1979), slip op. 6 (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring); see,

e.g., *Touche Ross & Co.* v. *Redington*, No. 78-309 (June 18, 1979), slip op. 7. The Buy Indian Act (the Act), 25 U.S.C. 47, broadly declares:

> So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

In our view, the court of appeals erroneously concluded that road construction performed by an Indian contractor is not a "product[] of Indian industry." [10]

The Act does not limit "products" except insofar as the producer must be an "Indian industry." In the absence of a restrictive modifier, the court of appeals should have given product its "naturally broad and inclusive meaning." See *Reiter* v. *Sonotone Corp.*, No. 78-690 (June 11, 1979), slip op. 4.[11]

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[10] Of course, insofar as road construction by an Indian enterprise involves employment of Indian workers, the Honobia Road contract also falls within the Act as the employment of "Indian labor." Here, the record shows that the top management and at least some of the laborers at Indian Nations were Indians. See note 5, *supra*.

[11] For example, *Webster's Third New International Dictionary* 1810 (unabridged 1976) defines product as "something produced by physical labor * * *, the result of work, * * * the output of an industry or firm." Similarly, the *Shorter Oxford English Dictionary* 1592 (3d ed. 1966) states that a product is "[t]hat which is produced by any action, operation, or work, * * * the result." "Produce" is also broadly defined: "To bring (a thing) into existence from its raw materials or elements" (*ibid.*).

Although we are unaware of any other judicial decision construing "product" as used in the Buy Indian Act,[12] both Congress and the courts have expansively defined "product" or "produce" in other contexts. See, *e.g.*, *Parker* v. *Seaboard Coastline R.R.*, 573 F.2d 1004, 1010 (8th Cir. 1978); *Home Indemnity Co.* v. *Miller*, 399 F.2d 78, 83 (8th Cir. 1968); 29 U.S.C. 203(j); 26 U.S.C. 864(a). As the Ninth Circuit has explained (*Great Western Broadcasting Corp.* v. *NLRB*, 310 F.2d 591, 595 (1962)):

> In its broadest sense, the term "product" denotes anything which is produced. Since economic activity includes the rendition of services, it is appropriate, where the context otherwise permits, to refer to a completed service as a "product."

And a broad construction of the word "product" appears particularly warranted here, because remedial Indian legislation must "be liberally construed, doubtful expressions being resolved in favor of the Indians." *Wilson* v. *Omaha Indian Tribe*, No. 78-160 (June 20, 1979), slip op. 10; *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918).

Moreover, nothing in the language of the Act supports the court of appeals' apparent notion that Congress meant to limit "products" to those goods typi-

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[12] The Comptroller General and the Department of Interior have consistently construed the term "product" as used in the Buy Indian Act to cover a multitude of activities. See, *e.g.*, Decision No. B-134031, 37 Comp. Gen. 368, 371 (1957). See generally pages 26-31, *infra*.

cally produced by Indians circa 1910.[13] The Act does not refer to "traditional Indian products" or to "products of traditional Indian industries." Rather, the Act empowers the Secretary to make open market "purchases of the products of Indian industry." The natural and reasonable reading of that language is that Congress intended to permit preferential purchases of the output of any Indian labor or Indian operation.[14] In short, the conclusion that road construction may be a "product of Indian industry" simply does not "strain" the language of the Buy Indian Act (Pet. App. 19a).

B. The Legislative History Of The Act Confirms That The Act Was Intended To Apply To Construction Work

The legislative history of the Act further refutes the court of appeals' narrow interpretation of what

[13] In fact, the legislative history and contemporaneous administrative reports demonstrate that Indians were engaged in construction at the time of the enactment of the Buy Indian Act and that Congress intended the Act to cover such endeavors. See pages 20-29, *infra*.

[14] As we discussed above (see note 5, *supra*), respondent erroneously suggests that Indian Nations is owned in part by Hubert Day, a non-Indian (Br. in Opp. 5-6); the documents attached to the government's cross-motion for summary judgment demonstrate conclusively that the sole owners and directors of Indian Nations are three Indians and that Hubert Day is the general superintendent of construction. Furthermore, Congress has expressly defined an Indian economic enterprise as a business in which "Indian ownership shall constitute not less than 51 per centum of the enterprise." 25 U.S.C. 1452(e). Under the Buy Indian regulations, the Secretary has imposed a stricter 100% Indian ownership rule. See note 3, *supra*.

constitutes a product of Indian industry.[15] The Buy Indian Act has its origins in a series of appropriations acts concerning the welfare of Indians and the funding of the Indian Department of the Department of the Interior.[16] Like most of the other Indian

[15] Of course, even if the legislative history were silent as to the intent of Congress on this point, the court of appeals unduly restricted the scope of the Act. See, *e.g.*, *United States* v. *Bornstein*, 423 U.S. 303, 310 (1976) ("But the absence of specific legislative history in no way modifies the conventional judicial duty to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question").

[16] For example, the Act of Apr. 30, 1908, ch. 153, 35 Stat. 71, provided (emphasis supplied):

> That no purchase of supplies for which appropriations are herein or hereinafter made for the Indian service, exceeding in the aggregate five hundred dollars in value at any one time, shall be made without first giving at least three weeks' public notice by advertisement, except in case of exigency, when, in the discretion of the Secretary of the Interior, who shall make official record of the facts constituting the exigency, and shall report the same to Congress at its next session, he may direct that purchases may be made in open market in amount not exceeding three thousand dollars at any one purchase: *Provided*, That hereafter supplies may be purchased, contracts let, and labor employed for the construction of artesian wells, ditches, and other works for irrigation, not to exceed the sum of five thousand dollars in any one purchase or contract, in the discretion of the Secretary of the Interior, without advertising as hereinbefore provided: *Provided further, That as far as practicable Indian labor shall be employed and purchase in the open market made from Indians, under the direction of the Secretary of the Interior.*

As early as 1894, Congress began requiring that "purchase in open market shall as far as practicable, be made from

appropriations bills, the 1908 Indian appropriations measure set aside money for substantial construction projects, including "works for irrigation," "school buildings," and "*a wagon road on the Hoopa Valley Indian Reservation.*" Act of Apr. 30, 1908, ch. 153, 35 Stat. 71, 72, 77 (emphasis supplied). At the same time that it appropriated these monies, Congress expressly directed the Secretary of the Interior to prefer Indian labor and Indian enterprises in executing these Indian projects.[17]

The legislative materials accompanying the 1908 enactment further reflect Congress' understanding that the preference statute applied to large construction projects and that individual or collective Indian

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Indians under the direction of the Secretary of the Interior." Act of Aug. 15, 1894, ch. 290, Section 3, 28 Stat. 312. See also Act of Mar. 2, 1895, ch. 188, Section 2, 28 Stat. 907; Act of June 10, 1896, ch. 398, Section 2, 29 Stat. 348-349; Act of June 7, 1897, ch. 3, Section 2, 30 Stat. 90; Act of July 1, 1898, ch. 545, Section 2, 30 Stat. 595; Act of Mar. 1, 1899, ch. 324, Section 3, 30 Stat. 946; Act of May 31, 1900, ch. 598, Section 2, 31 Stat. 246; Act of Mar. 3, 1901, ch. 832, Section 2, 31 Stat. 1083; Act of May 27, 1902, ch. 888, Section 2, 32 Stat. 273-274; Act of Mar. 3, 1903, ch. 994, Section 2, 32 Stat. 1006; Act of Apr. 21, 1904, ch. 1402, Section 2, 33 Stat. 216; Act of Mar. 3, 1905, ch. 1479, Section 2, 33 Stat. 1077; Act of June 21, 1906, ch. 3504, 34 Stat. 326; Act of Mar. 1, 1907, ch. 2285, 34 Stat. 1015. Earlier Indian appropriations statutes contained similar language. See, *e.g.*, Act of May 15, 1886, ch. 333, Section 3, 24 Stat. 46; Act of Mar. 3, 1893, ch. 209, Section 3, 27 Stat. 639.

[17] The proviso to the relevant section of the 1908 Act, quoted above, must be read, we believe, to qualify all purchases and contracts covered by the appropriation. Indeed, the appropriation for the Hoopa Valley road itself reiterated that "the labor for said construction to be performed as far as practicable by the Indians for the reservation." *Id.* at 77.

entrepreneurs could and should be hired to build irrigation and transportation systems in Indian areas. For example, Representative Sherman explained (42 Cong. Rec. 1695 (1908)):

> It has been found advantageous to apply [a no-advertising] rule in the administration of the Indian Bureau. So far as it relates to irrigation work this provision was asked so as to make it possible to use Indian labor and Indian supplies as much as possible, so that an Indian who had a team could have his team employed, and an Indian who could not perhaps make a bid for the whole contract, could not furnish a bond, did not have the ability to undertake a work even of moderate size, might be employed, and help sustain himself by furnishing his own service, furnishing what supplies he had himself on his own allotment, and also furnish occupation for his team, farm implements, and so forth.

See also S. Rep. No. 278, 60th Cong., 1st Sess. 18-19 (1908) (Indians in Hoopa Valley Indian reservation to build road) (letter between Secretary of the Interior James R. Garfield and Senator Moses E. Clapp of the Senate Committee on Indian Affairs); 42 Cong. Rec. 1696 (1908) (remarks of Rep. Stephens); *id.* at 2426 (remarks of Sen. Clapp); *id.* at 2643 (remarks of Sen. Heyburn); *id.* at 3253, 4561, 4565, 4566-4567, 5020 (monies appropriated for road building, including Hoopa Valley Road).[18] In

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[18] The preference legislation was part of Congress' attempt to help the Indians, who had been confined to reservations

sum, at least the early versions of the Buy Indian Act were intended to encompass construction projects such as the Honobia Road, as well as more traditional Indian products.

In 1910, Congress legislated this long standing preference for Indian products into positive law. Consistent with its predecessors, the Buy Indian Act required the preferential "purchases of the products of Indian industry" and employment of "Indian labor." [19] Because the Act adopted the language of the prior appropriations statutes *in haec verba*, there is no justification for construing the Act more narrowly than its predecessors—at least in the absence of compelling indications of contrary congressional intent.

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and deprived of their usual means of support (hunting), become self-sufficient. In addition, Congress allotted parcels of land to each adult Indian on the reservations. See generally *Mattz* v. *Arnett*, 412 U.S. 481 (1973); *Halbert* v. *United States*, 283 U.S. 753 (1931); Act of Apr. 30, 1908, ch. 153, 35 Stat. 70-71.

[19] The Act was formally designated as Section 23 of the Act of June 25, 1910, ch. 431, 36 Stat. 861, which provided:

> That hereafter the purchase of Indian supplies shall be made in conformity with the requirements of section thirty-seven hundred and nine of the Revised Statutes of the United States: *Provided*, That so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior. All Acts and parts of Acts in conflict with the provisions of this section are hereby repealed.

A history of the subsequent amendments and codifications of the Act is set forth *infra*, at pages 34-36.

See *Oscar Mayer & Co.* v. *Evans*, No. 78-275 (May 21, 1979), slip op. 4; *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *Northcross* v. *Board of Education*, 412 U.S. 427, 428 (1973); *Francis* v. *Southern Pacific Co.*, 333 U.S. 445, 450 (1948). See also *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U.S. 531, 545-546 (1978) ("[A]s Mr. Justice Cardozo observed, words or phrases in a statute come 'freighted with the meaning imparted to them by the mischief to be remedied and by contemporaneous discussion. In such conditions history is a teacher that is not to be ignored.' *Duparquet Co.* v. *Evans*, 297 U.S. 216, 221 (1936)").

Further support for the conclusion that Congress intended the Act to apply to a broad range of Indian endeavors is found in the contemporaneous legislative history. Other sections of the Act itself specifically provided that the Secretary of the Interior would continue to supervise major construction projects in Indian areas, such as the building of irrigation works. See Act of June 25, 1910, ch. 431, Sections 13, 17, 36 Stat. 858, 860; H.R. Rep. No. 1135, 61st Cong., 2d Sess. 5-6 (1910). And the pertinent legislative debates, though somewhat sparse, make clear that those projects would remain subject to an Indian preference law, now codified in the Buy Indian Act. As Representative Burke explained (45 Cong. Rec. 6097 (1910)):

> The legislation proposed will give the Indian service all the relief from a strict compliance with the general [advertising] law * * * that is

> necessary in the interest of good administration. There is no reason why Indian service contracts for either supplies or irrigation systems should not conform to the law applicable to all other branches of the public service except in so far as the proviso in the proposed legislation affects the purchases of products of Indian industry and the employment of Indian labor.

See also H.R. Rep. No. 1135, *supra*, at 12; 45 Cong. Rec. 8900, 8981 (1910).[20]

C. The Court Of Appeals Should Have Deferred To The Well-Established Administrative Construction Of The Act

The court of appeals' narrow reading of the Act is also inconsistent with the well-settled rule that "'* * * the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *.'" *E. I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); see, *e.g.*, *United States* v. *Rutherford*, No. 78-605 (June 18, 1979), slip op. 8; *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978).[21] In light of the

[20] The 1910 enactment did represent a change from the past insofar as Congress eliminated other exceptions from the general advertising requirements (such as the $500 exemption) that had frequently appeared in the earlier appropriations bills. See 45 Cong. Rec. 6097 (1910).

[21] There is thus no basis for the court of appeals' suggestion that "if the Government's administrative interpretation is entitled to the deference urged, the Congress is the branch before whom the point should be pressed" (Pet. App. 16a).

language and legislative history of the Act canvassed above, it cannot be gainsaid that the Secretary's broad interpretation of the Act is, at a minimum, a reasonable one. Moreover, as we now demonstrate, the courts below erroneously concluded (Pet. App. 12a, 46a) that the administrative construction was neither contemporaneous nor of longstanding.

We earlier observed that the current Buy Indian Act is derived from a series of Indian appropriations measures between 1886 and 1908. See pages 20-22, & note 16, *supra*. The annual reports that the Department of the Interior was required to submit to Congress in those years evidence a consistent administrative understanding that the Indian preference legislation applied to major (Indian-related) construction projects. For example, the *Annual Report of the Secretary of the Interior* 19-20 (1907), reprinted in I *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1907*, noted that "[s]pecial effort has been made by the Indian Office to find employment for the Indians" and that in particular "[t]he reclamation work has * * * given the opportunity for the employment of a large number of Indians in the construction of the ditches and reservoirs." Similarly, the *Annual Report of the Commissioner of Indian Affairs* 57-58 (1908), reprinted in II *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1908*, points out that government-paid "Indian teams and labor" were responsible for much of the construction of various irrigation

projects.[22] See also *Annual Report of the Secretary of the Interior* 24 (1909), reprinted in I *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1909*; *Annual Report of the Commissioner of Indian Affairs* 6-7 (1909), reprinted in II *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1909*.

The passage of the Buy Indian Act in 1910 did not interrupt the consistent administrative practice regarding the preferential use of Indian labor and Indian teams on major construction projects. To the contrary, the Commissioner of Indian Affairs reported in 1910 that "[a] large number of Indians [and their teams] have been employed, as usual, on irrigation works, railway construction, and other projects." *Annual Report of the Commissioner of Indian Affairs* 8 (1910), reprinted in II *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1910;* see *id.* at 8-9, 22-24; *Annual Report of the Secretary of the Interior* 41 (1911) ("In constructing irrigation works, care is taken to employ Indian labor as much as is possible"), reprinted in I *Reports of the Department of the Interior*

[22] The Commissioner acknowledged that he had been unable to hire Indians to perform the construction work on one of the reservations:

> The work of constructing the several systems of irrigation on the former Uintah Reservation in Utah has been carried forward during the year at an expense of $149,006.29. Of this sum, I regret to say, only $3,356.48 was paid for Indian labor, as it was almost impossible to induce the Ute Indians to work on canal construction.

for the Fiscal Year Ended June 30, 1911; *Annual Report of the Commissioner of Indian Affairs* 14-15, 31 (1911), reprinted in II *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1911*. In fact, in 1911, which was the first full year in which the Buy Indian Act was operative, the Commissioner told Congress that he had used Indians "wherever practicable" in "the construction of roads, trails, and telephone lines" in Indian forestry areas. *Id.* at 17.[23]

In short, the early administrative history of the Act reveals that the Office of Indian Affairs (now BIA) hired, as far as was practicable, both Indian laborers and Indian entrepreneurs who owned teams to execute major construction projects. The first administrators of the Act applied it to construction work, including road building. That application was consistent with their view that the phrase "Indian industry" referred to a wide variety of activities performed by Indians, including "farming" and "ordinary industrial activities." [*1911*] *Annual Report of the Secretary of the Interior*, *supra*, at 38-39; see, *e.g.*, *Annual Report of the Commissioner of Indian Affairs* 25-36 (1912), reprinted in II *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1912*; *Annual Report of the Commissioner of Indian Affairs* 28 (1911), reprinted in II *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1911*.

[23] The Honobia Road project is, of course, a logging road in an Indian area.

To be sure, the initial administrative reports do not speak of corporate contracting firms owned by Indians. But, in light of the economic and political circumstances [24] of the Indians at the turn of this century, it is hardly surprising that they had not yet established corporate structures. Moreover, the contemporaneous reports specifically anticipated that the Indians would gradually develop construction businesses and various other industries. See, *e.g.*, [*1911*] *Annual Report of the Secretary, supra*, at 38-39; [*1910*] *Annual Report of the Commissioner, supra*, at 19; *Annual Report of the Secretary of the Interior* 52-53 (1912), reprinted in I *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1912.* And more recently, when Indians have in fact formed construction companies and other industrial corporations, the BIA has consistently concluded that the products of these corporations are entitled to a preference under the Act. See, *e.g.*, Opinion of the Solicitor of the Department of the Interior 5-7 (Apr. 27, 1971); *Department of the Interior and Related Agencies Appropriations for Fiscal Year 1970: Hearings on H.R. 12781 Before a Subcomm. of the Senate Comm. on Appropriations*, 91st Cong., 1st Sess., Part 1, 166, 190-194 (1969) (statement of Commissioner of Indian Affairs) ("small road construction projects," and other construction

[24] Indians were not generally entitled to citizenship until 1924. See Act of June 2, 1924, ch. 233, 43 Stat. 253.

work subject to Buy Indian Act).[25] See also Decision No. B-134031, 37 Comp. Gen. 368, 371 (1957) (Indian-owned coal mine is an industry subject to Buy Indian Act); Decision No. B-169669, 50 Comp. Gen. 94 (1970); Decision No. B-187082, 56 Comp. Gen. 178, 179-180 (1976).

D. The Buy Indian Act Should Be Liberally Construed To Effectuate The Strong Congressional Policy Favoring Indian Industry And Employment

Like other remedial statutes enacted on behalf of the Indians,[26] the Buy Indian Act is an expression of the special relationship between the federal government and the Indians, "who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930). See *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956). Although Congress has from time to time adopted different philosophies regarding this relationship,[27] it has

[25] In light of Congress' awareness of this administrative construction, and the legislative approval implicit in Congress' repeated funding of the BIA road construction program, the administrative interpretation is entitled to particular deference. See, *e.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974).

[26] See generally *Morton* v. *Mancari*, 417 U.S. 535, 538 n.2, 541 n.8 (1974). See also Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.*; Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450 *et seq.*

[27] Cf. *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 71-72 (1962). At the time that the Buy Indian Act was passed, Congress was determined to break down the tribal patterns and to "civilize" the Indian people. See 28 Cong. Rec. 2026

consistently attempted to foster the development of Indian economic enterprises. See 25 U.S.C. 13; Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450e; Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.* In particular, Congress has repeatedly recognized that protective legislation and special federal assistance is required to ensure the existence of significant Indian industry. See, *e.g.*, 25 U.S.C. 450e(b); 25 U.S.C. 1451; Act of Mar. 1, 1926, ch. 41, 44 Stat. 135-136; H.R. Rep. No. 93-907, 93d Cong., 2d Sess. 1-2 (1974); 42 Cong. Rec. 1418, 1694, 1706-1707 (1908).

It is therefore apparent that the cramped construction of the court of appeals is at odds with the congressional policies that underlie the Act. The court's restrictive view of what constitutes a "product[] of Indian industry" frustrates the protective purpose of the Act, because a preference is most critical in competitive markets such as the construction industry.[28] As Judge McKay observed in dissent (Pet. App. 27a), the "[majority] opinion threatens to relegate [the Act] to a role of protecting Indian handicraft and trinket production—economic activi-

(1896); 42 Cong. Rec. 1418, 1694, 1706-1707 (1908). More recently, Congress has recognized the importance of preserving Indian self-government and the tribal unit. See, *e.g.*, Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450 *et seq.*

[28] Of course, limiting certain procurement decisions to qualified Indian firms will not eliminate competition altogether since in many instances there will be several Indian bidders.

ties that probably require no preferential treatment at all."

The adverse impact of the decision below on Indian industries is not theoretical. We are informed that, as a result of this decision, BIA road construction contracts awarded to Indian firms dropped from approximately $11 million in 1977 to $2.3 million in 1978, even though total BIA road construction increased from $36.7 million to $44.6 million in that same time period.[29] In addition, there have been several bankruptcies among Indian construction firms and a concomitant drop in Indian employment in the construction field has apparently followed.

II. THE BUY INDIAN ACT PERMITS PREFERENTIAL PURCHASES OF THE PRODUCTS OF INDIAN INDUSTRY WITHOUT PUBLIC ADVERTISING

The courts below also held (Pet. App. 6a, 46a) that, even if applicable to road construction, the Buy Indian Act does not authorize the Secretary of Interior and his delegates to negotiate with Indian firms without complying with the public advertising requirements of the Federal Property and Administrative Services Act (FPASA), as amended in 1965, 41 U.S.C. 251 *et seq.* We answer that Congress intended the Buy Indian Act to be an exception to

[29] Even the $2.3 million figure may be misleading because only $269,353 of that amount was awarded to Indian firms after competitive, advertised bidding open to the public. All figures represented are derived from BIA financial year data.

general advertising requirements. Indeed, before 1965, there is little question that the Secretary could negotiate purchases of Indian products without advertising. And, as the language and legislative history of the FPASA make clear, Congress did not impliedly repeal this long standing advertising exemption when it extended the FPASA to cover all agencies, including the BIA, in 1965.

A. Prior To 1965, Buy Indian Contracts Were Not Subject To General Advertising Requirements

1. When the Buy Indian Act was enacted in 1910, the only federal statute generally requiring public advertising for governmental procurement was Section 3709 of the Revised Statutes.[30] That Congress intended to except purchases of Indian products from the strictures of Section 3709 is "patent from the text" of the Act. H.R. Rep. No. 1135, 61st Cong., 2d Sess. 12 (1910). The original version of the Act

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[30] See Act of Mar. 2, 1861, ch. 84, Section 10, 12 Stat. 220. Section 3709 of the Revised Statutes provided:

> All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals.

unambiguously established that the Indian Service (BIA's predecessor) was generally subject to Section 3709, except for the Secretary's "purchases of the products of Indian industry * * * in open market." Act of June 25, 1910, ch. 431, Section 23, 36 Stat. 861. See note 19, *supra*. Indeed, we do not understand respondent to contend otherwise.

In any event, the legislative history of the Act forecloses any argument on this point. The pertinent House Report states that "[w]ith the exceptions noted in the proviso [*i.e.*, purchases of Indian products and employment of Indian labor], [the Act] will bring the Indian Service, like all other branches of the public service, under the provisions of section 3709 of the Revised Statutes." H.R. Rep. No. 1135, *supra*, at 12. In addition, the legislative debates accompanying both the Act and its predecessors (see pages 20-26, *supra*) show that the phrase "purchases * * * in open market" refers to unadvertised, negotiated purchases. For example, Congressman Sherman explained that at times "it was necessary to go into the open market rather than wait for advertising." 42 Cong. Reg. 1695 (1908). See *id.* at 1696 (remarks of Rep. Mann); 45 Cong. Rec. 6097 (1910) (remarks of Rep. Burke).

2. The subsequent amendments and codifications of the Buy Indian Act and Section 3709 of the Revised Statutes have not affected their interrelationship. Although the 1918 edition of the Compiled Statutes of the United States showed the Buy Indian

Act as essentially unchanged,[31] the first and second sentences of the Act appeared in two separate sections in the 1926 edition of the United States Code. That is, BIA's general duty to adhere to Section 3709 advertising requirements (now found in 41 U.S.C. 5) was codified in 25 U.S.C. 93 and the proviso regarding Indian goods was placed in 25 U.S.C. 47. No explanation appears for this apparently arbitrary decision of the codifiers, and, of course, this division of the Buy Indian Act did not affect the meaning or application of the statute since Congress did not enact this codification. See Act of June 30, 1926, ch. 712, Section 2, 44 Stat. 777 (printed in 44 Stat. (Vol. I) 1).[32]

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[31] U.S. Comp. Stat. (1918), Sections 6835, 6835a. The Act had been amended in 1916 to permit unadvertised purchases of non-Indian products for up to $50. Act of May 18, 1916, ch. 125, 39 Stat. 126. This $50 exemption was increased to $100 in 1928. Act of Jan. 12, 1927, ch. 27, 44 Stat. 936.

[32] In 1940, Congress consolidated various exceptions to the general advertising requirements into Title 41 of the United States Code and concomitantly eliminated the now redundant sections scattered throughout the Code. See Act of Oct. 10, 1940, ch. 851, 54 Stat. 1109-1114, codified at 41 U.S.C. (1946 ed.) 6, 6a, repealed Act of Oct. 31, 1951, ch. 654, Section 1 (107), 65 Stat. 705. Among those sections was 25 U.S.C. 93, which was repealed and replaced by 41 U.S.C. (1946 ed.) 6a(g). See Act of Oct. 10, 1940, ch. 851, 54 Stat. 1110, 1112. The Buy Indian Act itself (25 U.S.C. 47) was unaffected by these changes (see 54 Stat. 1112). Indeed, the 1940 enactment as a whole made "no changes in existing law." H.R. Rep. No. 2647, 76th Cong., 3d Sess. 1 (1940). See *id.* at 2 ("Only changes in form have been made"); S. Rep. No. 2135, 76th Cong., 3d Sess. 1 (1940).

The 1940 legislation does confirm, however, that purchases "in open markets" refers to unadvertised procurement. See, *e.g.*, 41 U.S.C. (1946 ed.) 6a(g) (Department of the Interior purchases of less than $100).

Similarly, none of the several congressional amendments of Section 3709 of the Revised Statutes (41 U.S.C. 5) since 1910 have abrogated the exception for Indian products set forth in the Buy Indian Act. Thus, although Section 3709 was substantially rewritten in 1946, the new version nonetheless states that the general advertising requirements did not apply where "otherwise provided [by] * * * other law." Act of Aug. 2, 1946, ch. 744, Section 9, 60 Stat. 809.[33]

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[33] 41 U.S.C. (1946 ed.) 5 provided in relevant part:

> Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except (1) when the amount involved in any one case does not exceed $100, (2) when the public exigencies require the immediate delivery of the articles or performance of the service, (3) when only one source of supply is available and the Government purchasing or contracting officer shall so certify, or (4) when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis. * * *

The statute remains essentially unchanged, except that the $100 exemption has been periodically increased. See Act of June 30, 1949, ch. 288, Section 502(e), 63 Stat. 403 ($500); Pub. L. No. 85-800, Section 7, 72 Stat. 967 ($2,500). The exemption for small purchases is currently $10,000. See Pub. L. No. 93-356, Section 1, 88 Stat. 390.

Furthermore, the legislative reports accompanying the 1946 enactment point out that the rewritten version only codifies, clarifies, and perfects "existing law." See S. Rep. No. 1636, 79th Cong., 2d Sess. 6-7 (1946); H.R. Rep. No. 2186, 79th Cong., 2d Sess. 6-7 (1946).

Accordingly, it is beyond dispute that 41 U.S.C. 5 does not bar the negotiation of contracts pursuant to the Buy Indian Act.[34] See also *Morton* v. *Mancari*, 417 U.S. 535, 541-551 (1974) (enactment of Title VII did not impliedly repeal long standing Indian preference statutes). The only issue remaining then is whether the Buy Indian Act also exempts Indian contracts from the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 251 *et seq.*, after the amendment of the latter statute in 1965. We now turn to address this issue.

B. The Federal Property And Administrative Services Act Of 1949, As Amended, Did Not Abrogate The Secretary's Power To Negotiate Contracts With Indian Firms Under The Buy Indian Act

1. *Introduction.* The courts below concluded that the Federal Property and Administrative Services Act of 1949, as amended (FPASA), 41 U.S.C. 251 *et seq.*, mandates that the Secretary of the Interior publicly advertise all BIA road construction contracts notwithstanding the Buy Indian Act. The FPASA did not expressly repeal the Buy Indian Act. In fact, as originally enacted, the advertising requirements of the FPASA applied only to the General

[34] Neither court below suggested otherwise.

Services Administration and those agencies which voluntarily chose to follow GSA procurement regulations. See Federal Property and Administrative Services Act of 1949, ch. 288, Section 302(a), 63 Stat. 393; H.R. Rep. No. 670, 81st Cong., 1st Sess. 20-21 (1949); S. Rep. No. 274, 89th Cong., 1st Sess. 1 (1965); H.R. Rep. No. 1166, 89th Cong., 1st Sess. 6 (1965).[35] And, although the FPASA was amended in 1965 to cover federal agencies generally (41 U.S.C. 252(a),[36] nothing in the Act as amended refers directly to BIA procurement or explicitly abrogates or limits the Buy Indian Act.

Thus, if the FPASA has repealed the Buy Indian Act, it has done so impliedly. But, in *Morton* v. *Mancari*, *supra*, this Court made clear that a statute of general application does not constitute an implied repealer of a longstanding Indian preference statute, including the Buy Indian Act, unless there is an affirmative showing of a congressional intent to repeal. 417 U.S. at 549-551. See also *Livingston* v. *Ewing*, 601 F.2d 1110 (10th Cir. 1979).[37] Here, how-

[35] The primary purpose of the original FPASA was the creation of the GSA as a means of controlling and centralizing much government procurement and also managing government supplies. See H.R. Rep. No. 670, *supra*, at 2, 7. Title III of the FPASA contained a detailed advertising statute based upon the Armed Services Procurement Act of 1947, ch. 65, 62 Stat. 21, and intended as a modernized substitute for 41 U.S.C. 5. See H.R. Rep. No. 670, *supra*, at 6, 20-21; S. Rep. No. 274, *supra*, at 1; S. Rep. No. 338, 81st Cong., 1st Sess. 23 (1949).

[36] See Pub. L. No. 89-343, 79 Stat. 1303; S. Rep. No. 274, *supra*, at 1; H.R. Rep. No. 1166, *supra*, at 1-2.

[37] In *Morton* v. *Mancari*, the Court considered whether the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-

ever, neither respondent nor the lower courts have pointed to any hint that Congress intended to abrogate a century-old policy of Indian preferences. Indeed, as we now demonstrate, the language and legislative history of the FPASA overwhelmingly show that Congress meant to preserve existing exemptions to the general advertising laws such as the Buy Indian Act.

2. *The advertising requirements of the FPASA do not govern Buy Indian contracts.* When it extended the scope of the FPASA in 1965 to cover all government agencies, Congress purposefully preserved existing exceptions to the general advertising law. Section 302(c) of the FPASA, 41 U.S.C. 252(c), enumerates 15 exceptions to the advertising requirements, including an exemption "otherwise authorized by law." 41 U.S.C. 252(c)(15) ("exemption 15"). In addition, Section 310 of the Act, as amended by Section 5 of the 1965 amendment, unambiguously establishes that any law that constitutes an exception to Section 3709 of the Revised Statutes (41 U.S.C. 5) also qualifies as an exception to the FPASA under exemption 15 (Pub. L. No. 89-343, Section 5, 79 Stat. 1303, 41 U.S.C. 260):

16(a), which extended Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to government employment, repealed a preference for Indian employment within the BIA. Although the Court there addressed Section 12 of the Indian Reorganization Act, 25 U.S.C. 472, it specifically noted that the same result would have obtained with regard to the Buy Indian Act itself. See 417 U.S. at 538 n.2 & 541 n.8.

> Any provision of law which authorizes an executive agency * * * to procure any property or services without advertising or without regard to said section 3709 shall be construed to authorize the procurement of such property or services pursuant to section 302(c)(15) of this Act [41 U.S.C. 252(c)(15)] without regard to the advertising requirements of section 302(c) and 303 [41 U.S.C. 253] of this Act.[38]

Likewise, the Committee Reports confirm that "exemptions from the requirements of Revised Statutes, section 3709 * * * are preserved [under the FPASA] as exceptions from the advertising requirements of sections 302(c) (and 303) of the act pursuant to section 302(c)(15)." H.R. Rep. No. 1166, *supra*, at 8; S. Rep. No. 274, *supra*, at 5.[39] It is thus apparent that the Buy Indian Act, which both constitutes an exception to Section 3709 of the Revised Statutes and also

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[38] Current Section 310 derives from Section 1(n) of the Act of July 12, 1952, ch. 703, 66 Stat. 594, 41 U.S.C. (1964 ed.) 260(b). The earlier version, which was enacted in 1952, also set forth "in effect, that when section 3709 is inapplicable to a certain type of contract, section 302(c) shall likewise be inapplicable to that type of contract." H.R. Rep. No. 1524, 82d Cong., 2d Sess. 11 (1952).

[39] Exemption 15 appeared in the original FPASA as exemption 14. See 63 Stat. 393-394. The legislative reports reflect with clarity Congress' intent to "preserve the authority to negotiate contracts conferred by other permanent legislation." S. Rep. No. 338, 81st Cong., 1st Sess. 20 (1949). See *id.* at 5; S. Rep. No. 475, 81st Cong., 1st Sess. 5, 23-24 (1949); H.R. Rep. No. 670, *supra*, at 23. See also S. Rep. No. 571, 80th Cong., 1st Sess. 14-15 (1947) (discussing similar provision in Armed Services Procurement Act of 1947).

authorizes unadvertised procurement in the open market (see pages 34-35, *supra*), falls within the plain terms of exemption 15.[40]

Although the courts below apparently recognized that the Buy Indian Act was preserved by exemption 15 of the FPASA (Pet. App. 7a, 40a), they nonetheless held that Section 302(e)(B) of the FPASA requires the BIA to advertise road construction contracts. Section 302(e)(B) provides that "[t]his section shall not be construed to * * * permit any contract for the construction or repair of * * * roads * * * to be negotiated without advertising as required by section 253 of this title, * * * unless negotiation of such contract is authorized by the provisions of

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[40] In our view, the Buy Indian Act is also excepted from the FPASA pursuant to Section 302(a)(2) of the FPASA. That statute provides that the FPASA does not apply "when [it] is made inapplicable pursuant to * * * any other law." 41 U.S.C. 252(a)(2). The relevant discussion in the legislative reports regarding Section 302(a)(2), states that "the limited exemptions [from advertised contracting] specified * * * in any other law, are not eliminated by this section," and that an agency may "negotiate contracts [without] formally advertis[ing] * * * to the extent that it has negotiating authority under other law." H.R. Rep. No. 1166, *supra*, at 7; S. Rep. No. 274, *supra*, at 4. See *id.* at 2. The legislative history does not illuminate the distinction between Sections 302(a)(2) and 302(c)(15), but a law qualifying under the former is exempted from the entire FPASA whereas the latter constitutes an exemption as to the advertising requirements (41 U.S.C. 253) and not the negotiated contract requirements (41 U.S.C. 254) of the FPASA.

The Court need not resolve this distinction unless it disagrees with our submission regarding the interaction of exemption 15 and Section 302(e), 41 U.S.C. 252(e). See pages 42-46, *infra*.

paragraphs (1), (2), (3), (10), (11), (12), or (14) of subsection (c) of this section." 41 U.S.C. 252(e)(B). The district court reasoned (Pet. App. 40a-41a), and the court of appeals agreed (*id.* at 7a-8a), that the Buy Indian Act does not authorize the negotiation of major construction contracts such as the Honobia Road contract because exemption 15 is not included among the specific exemptions set forth in Section 302(e)(B). We disagree.

Section 302(e)(B) does not state that a major construction project such as road building may be awarded without public advertising only if negotiation is authorized by exemptions 1-3, 10-12, or 14. Rather it says that, with certain exemptions, "[*t*]*his section* shall not be construed to * * * permit [the negotiation of various construction contracts]." 41 U.S.C. 252(e)(B) (emphasis supplied). In other words, if the Secretary of the Interior seeks to let a road contract without advertised bidding based solely on the FPASA (*i.e.*, "this section"), then the contract must qualify under one of the seven exemptions enumerated in Section 302(e)(B).[41] But where, as

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[41] The court of appeals incorrectly stated (Pet. App. 3a-4a) that the government did not rely on any of the other enumerated exceptions found in Section 302(c). To the contrary, we urged (Ct. App. Br. 6-7) the court to consider whether negotiation of the Honobia Road contract was authorized as a matter of impracticability under 41 U.S.C. 252(c)(10), as well as under the Buy Indian Act. See *Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, 477 F.2d 696 (5th Cir. 1973), cert. denied, 415 U.S. 914 (1974) (Small Business Administration purchase of products of minority industry renders advertising impracticable as a matter of law); H.R. Rep. No. 670, *supra*,

here, the Secretary relies on another statutory source of authority (the Buy Indian Act), then Section 302 of the Act does not "authorize" or "permit" the transaction, and Section 302(e)(B) simply does not control. See also note 40, *supra*.

This distinction between exemption 15 and the other exemptions is drawn by the statute itself. Section 304 of the FPASA governs the form and content of "[e]very contract negotiated pursuant to section [302(c), 41 U.S.C.] 252(c)." 41 U.S.C. 254(a). If a contract negotiated pursuant to the Buy Indian Act was authorized or permitted by Section 302(c)(15), then such a contract would be a "contract negotiated pursuant to section [302(c)]" within the scope of Section 304. Congress recognized, however, that Section 302(c)(15) does not authorize or permit Buy Indian contracts. Indeed, that is why, in 1965, Congress specifically amended exemption 15 to subject Buy Indian purchases and like procurement to the requirements of Section 254. Pub. L. No. 89-343, Section 2, 79 Stat. 1303; see S. Rep. No. 274, *supra*, at 4 ("The effect of this addition would be to make the restrictions of section 304, which are applicable

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at 22 (exemption to be construed liberally); S. Rep. No. 571, 80th Cong., 1st Sess. 8 (1947). Furthermore, since the Court granted certiorari in this case, the Commissioner of Indian Affairs has issued a determination and finding that public advertising is impracticable given the goals and purposes of the BIA. See App. C, *infra*, 8a-10a. Accordingly, if the Court rejects our submissions in points I or II, it should remand this case to the court of appeals for consideration of Exemption 10 and the new BIA regulation.

to contracts negotiated under paragraphs (1) to (14) of section 302(c)[,] similarly applicable to contracts negotiated under paragraph (15)"); H.R. Rep. No. 1166, *supra*, at 7; 111 Cong. Rec. 12684 (1965).

The legislative history also undermines the court of appeals' construction of Section 302(e)(B). That statute was enacted in 1949 as part of the original FPASA. In the course of legislation, Congress repeatedly explained that Section 302(e)(B) had a significantly more circumscribed purpose than that ascribed to it by the courts below:

> For clarity this subsection [e] provides that section 302 does not authorize or change the existing requirements for authorization for the erection or repair of buildings, roads, sidewalks, or similar items.

H.R. Rep. No. 670, *supra*, at 23; S. Rep. No. 338, *supra*, at 20; S. Rep. No. 475, *supra*, at 25.

We further submit that the court of appeals' view of the FPASA in general and Section 302(e)(B) in particular is flatly inconsistent with the numerous congressional statements regarding the preservation of existing exceptions to the general advertising laws, such as the Buy Indian Act. See pages 41-42, *supra*.

In sum, here, as in *Morton* v. *Mancari*, there is no indication that Congress sought to limit or repeal the Buy Indian Act when it extended the FPASA in 1965. Three different sections of the FPASA and the legislative history confirm that Congress intended to preserve provisions such as the Buy Indian Act.

See 41 U.S.C. 252(a)(2), 252(c)(15), 260; pages 38-45, *supra*. In addition, here, as in *Morton* v. *Mancari*, the longstanding and specific Indian preference statute is readily harmonized with a newer law of general application. See 417 U.S. at 550-551; see also *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758 (1961). Congress has repeatedly placed its imprimatur on Indian preference legislation,[42] and the FPASA itself declares that it is the "policy of the Congress that a fair proportion of the total purchases and contracts for property and services for the Government shall be placed with small business concerns." 41 U.S.C. 252(b). Accordingly here, as in *Morton* v. *Mancari*, "[t]he courts are not at liberty to pick and choose among congressional enactments, * * * [but must] regard each as effective." 417 U.S. at 551.[43]

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[42] See pages 31-32, & note 16, *supra*. In particular, we note that Section 7(b) of the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450e(b), which was, of course, enacted after the FPASA, incorporates the preference policy of the Buy Indian Act. See also 41 C.F.R. 14H-70.000 *et seq.*; 44 Fed. Reg. 62510-62515 (1979) (regulations to be codified in 41 C.F.R. 14-1.354, 14-7.5002 to 14-7.5003); H.R. Rep. No. 93-1600, 93d Cong., 2d Sess. 15, 21 (1974). Congress thus does not view the policies inherent in the Buy Indian Act and the FPASA as incompatible. Cf. *Morton* v. *Mancari*, *supra*, 417 U.S. at 548-549.

[43] In light of the decision in *Morton* v. *Mancari*, respondent's constitutional claims are also without merit. See 417 U.S. at 551-555. See also *Livingston* v *.Ewing*, *supra*, 601 F.2d at 1115-1116.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1980

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Civil Action No. 77-178-C

GLOVER CONSTRUCTION COMPANY, A CORPORATION, PLAINTIFF

v.

CECIL ANDRUS, SECRETARY OF THE INTERIOR, *et al.*,

RELEVANT DOCKET ENTRIES

06/06/77 *Complaint*

09/07/77 ANSWER of the Defendants

10/26/77 Deposition of ALTON R. MORDWALL taken on behalf of plaintiff

10/26/77 Deposition of MAYNARD E. WING taken on behalf of plaintiff

10/26/77 Deposition of A. E. GREEN taken on behalf of plaintiff

10/26/77 Deposition of THOMAS E. DONAHOE, JR. taken on behalf of the plaintiff

11/01/77 MOTION for Pltf. For Leave of Court to Amend Complaint

11/03/77 ORDER granting plaintiff's Motion to Amend Petition [Sic]. (JWM) (copies counsel)

111/03/77 AMENDED COMPLAINT

11/09/77 Motion for Summary Judgment, by plaintiff

12/07/77 Motion of defendants, for Summary Judgment

01/29/78 ORDER GRANTING MOTION FOR SUMMARY JUDGMENT in favor of plaintiff and against defendants.

Defendants' cross-motion for summary judgment is denied. Pltf. & defts. directed to file within 10 days from the date of this order a joint status report indicating whether road construction work has been commenced pursuant to contract between defts and Indian Nations Construction Co . . . If parties cannot agree on join status report, each side will file such report. Further, pltf. directed to file within 10 days from the date of this order a brief setting forth the appropriate relief to be granted by way of final judgment in accordance wtih the views expressed in this order, etc. Defts. will have 10 days thereafter to file Response brief. (JWM) (Copies to counsel)

05/12/79 ORDER that road construction contract entered into between defts. and Indian Nations null and void. Pltfs. request that court order defts. to advertise the unperformed balance of road construction contract is denied. Pltfs. request for costs not properly before Court and shall file with court clerk within time limits. Pltfs. request for attorneys fees is denied. (JWM) (Copies to counsel)

05/12/79 FINAL JUDGMENT: In conformity with court's orders entered on 3/29/78 and on this date, it is adjudged (1) that the road construction contract entered into between defts. and Indian Nations Construction Co. is null and void. (2) that no refund is to be made of any sums heretofore paid under the contract to Indian Nations Construction Co.; (3) that defts. are permanently enjoined from circumventing the advertising requirements of 41 U.S.C., Sec. 253 in connection with future road construction contracts. (JWM) (Copies to counsel)

06/05/78 MOTION of defts. for Stay of Final Judgment pending appeal

06/05/78 NOTICE OF APPEAL

06/28/78 ORDER the Court concludes that a stay should not be granted pending an appeal to the court of appeals for the Tenth Circuit. The Court nonetheless does hereby stay the judgment for a period of 30 days so as to give the defendants an opportunity to secure a stay order from the court of appeals (JWM) (Copies to counsel)

No. 78-1554

GLOVER CONSTRUCTION COMPANY,
PLAINTIFF-APPELLEE

v.

CECIL ANDRUS, SECRETARY OF THE DEPARTMENT OF THE INTERIOR, *et al.*,

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RELEVANT DOCKET ENTRIES

07/18/78 Cause docketed; Record on Appeal, Vol. I (pleadings) (63++pp), orig. 63+++pp. Docketing statement; orig. & 9 cc

07/20/78 Appellant's Motion for Stay Pending Appeal, orig. & 3 cc to panel

08/14/78 Order—appellants' mot for stay pending appeal is granted. Judge Barrett voted to deny stay. It is further ordered that case be accelerated for hearing during Sept. term in Salt Lake City. Appellee's brief to be filed on or before 8/31/78. Reply brief, if any, to be filed on or before 9/15/78. Parties shall be notified at a later date of day & hour of argument—Barrett, McKay, Logan

08/15/78 Order—Upon the Court's own motion, the captioned case is set for oral argument and submission to the Court in Division II on Wednesday, September 27, 1978, at 9:30 a.m., in Salt Lake City, Utah. (Seth)

01/11/79 OPN.F—published, signed opinion filed by McWilliams, Barett, McKay Writing judge is Barett; Judge McKay dissents

JM.DIS—judgment affirmed by published signed opinion —McWilliams, Barrett, McKay

01/24/79 M.EXTM.F.P.REHRG.F—appellant's motion for extension of time to file petition for rehearing to 2/26/79 filed—4 copies, c/s

M.EXTM.F.P.REHRG.SUB.—appellant's motion for extension of time to file petiiton for rehearing submitted to panel

01/31/79 M.EXTM.F.P.REHRG.DISP—Order granting appellant's motion for extension of time to file petition for rehearing to 2/26/79—Disp. by McWilliams, Barrett, McKay

ISS.CC.O.—Issued certified copy of order granting extension of time to file petition for rehearing to parties

02/02/79 M.STAY.ISS.MDT.F.—appellant's motion to stay issuance of mandate pending application for—certiorari filed—4 copies—c/s

02/05/79 M.STAY.ISS.MDT.SUBM.—appellant's motion to stay issuance of mandate submitted to panel

02/23/79 M.EXTM.F.P.REHRG.F.—Appellant's motion for extension of time to 3/2/79 to file petition for rehearing filed, 4 copies, c/s

M.EXTM.F.P.REHRG.SUBM.—Appellant's motion for extension of time to 3/2/79 to file petition for rehearing submitted to panel

03/01/79 M.EXTM.F.P.REHRG.DIS.—order granting appellant's motion for extension of time to 3/2/79 to file petition for rehearing—McWilliams, Barrett, McKay

03/02/79 P.RHRG.F.—appellant's petition for rehearing filed—10 copies—c/s

P.RHRG.SUBM.—appellant's petition for rehearing submitted to panel

03/12/79 P.REHRG.DISP.—Order: Appellant's petition for rehearing ordered filed as of 3/2/79. Petition for rehearing is denied on the merits. Judge McKay voted to grant rehearing—Disp. by McWilliams, Barrett, McKay

ISS.CC.O.—Issued certified copy of order denying petition for rehearing tc parties

04/03/79 M.STAY.ISS.MDT,DISP.—order granting stay of mandate until 5/3/79—McWilliams, Barrett, McKay

05/10/79 M.STAY.ISS.MDT,DISP.—Order granting stay of mandate to 6/11/79

06/19/79 M.STAY.ISS.MDT,DISP.—Order granting stay of mandate to 7/10/79

APPENDIX B

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20245

[SEAL]

In Reply Refer To 20 BIAM Bulletin 1

Memorandum Mar. 3, 1976

To : Holders of 20 BIAM

From : Commissioner of Indian Affairs

Subject: Buy Indian Act Contracting

Regulations that implement the Indian Self-Determination and Education Assistance Act (Public Law 93-638, 88 Stat. 2203) and set forth the requirements that must be followed in contracting with Indian tribes and tribal organizations for the operation of Bureau programs that serve them were published beginning on page 51282 of the November 4, 1975, Federal Register (40 FR 51282). Although contracts for such programs may only be entered into in accordance with the "Self-Determination" regulations, these regulations do not prevent the Bureau from using the "Buy Indian Act" (25 USC 47) for other purposes. Therefore, the purpose of this Bulletin is to briefly state the Bureau's policy on the use of the "Buy Indian Act", pending publication of regulations dealing therewith in the Bureau's Procurement Regulations (41 CFR 14H).

It is the Bureau's policy that all purchases or contracts be made or entered into with qualified Indian

contractors to the maximum practicable extent. Before taking any procurement action, contracting officers shall first determine if there are any qualified Indian contractors within the normal competitive area that can fill the procurement requirement. Non-Indian contractors may be contacted only after it has been determined that there are no qualified Indian contractors within the normal competitive area that can fill or are interested in filling the procurement requirement.

For the purpose of this Bulletin, "Indian contractor" means a legal entity which is 100% Indian owned and controlled. "Indian" means a person who is a member of an Indian tribe or otherwise considered to be an Indian by the tribe with which affiliation is claimed. "Normal competitive area" means the geographic area within which competition is usually solicited in the filling of a procurement requirement.

As in the past, contracting officers shall:

1. Determine prior to contracting that the contractor is eligible to receive a contract under the "Buy Indian Act".
2. Obtain competition between Indian contractors when there is more than one that can fill the procurement requirement.
3. Adhere to all applicable requirements in the Federal and Interior Procurement Regulations (41 CFR 1 as Supplemented by 41 CFR 14).

4. Maintain a list of eligible Indian contractors within their respective areas and periodically furnish a copy thereof to all other Bureau contracting officers.
5. When appropriate, based on the type of procurement, include in the contract the percentage of work the contractor must perform with its own employees.
6. Make sure that the price of a contract awarded is fair and reasonable.

Any questions concerning this Bulletin should be addressed to the Contracting Staff in the Washington Office.

Regulations implementing the Buy Indian Act are being prepared and should be issued within the next few months.

/s/ Morris Thompson
Commissioner of
Indian Affairs

APPENDIX C

DETERMINATIONS AND FINDINGS AUTHORITY TO NEGOTIATE A CLASS OF CONTRACTS UNDER THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949, AS AMENDED

FINDINGS

1. The Bureau of Indian Affairs proposes to procure a class of contracts for supplies and non-personal services (including construction) by negotiating with Indian contractors exclusive of non-Indian contractors. This D&F applies to all procurements of the Bureau of Indian Affairs issued pursuant to the regulations and policy statements implementing 25 U.S.C. 47, "The Buy Indian Act".

2. The Congress recognized in § 3(a) of P.L. 93-638 the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in Federal services to Indian communities.

3. The Congress has authorized the Bureau of Indian Affairs in 25 U.S.C. 13 to assist Indians throughout the United States by providing for industrial assistance and advancement as well as general support.

4. The Congress has also authorized the Bureau of Indian Affairs in 25 U.S.C. 47 to utilize, so far as may be practicable, Indian labor and the output of Indian businesses.

5. A national policy has been set by the Congress in § 201 of P.L. 95-507 to recognize that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy.

6. Further, Congress has recognized the need for and has established an Indian Business Development Program to stimulate and increase Indian entrepreneurship and employment, 25 U.S.C. 1521.

7. In issuing Executive Order 11625 dated October 13, 1971, the President has directed that every effort be made to foster the expansion and development of existing, newly organized, or prospective profit-oriented minority business concerns which include Indian businesses.

8. Historically, it has been impracticable to carry out the Congressional and Presidential policies and mandates set forth above, and in other pertinent authorities, as related to the Indian business community, by the use of standard formal advertising procedures. In order to assure participation by Indians in Federal activities impacting Indian communities, in order to provide assistance and general support to the Indian business community, in order to stimulate and increase Indian entrepreneurship and employment, in order to obtain social and economic equality for socially and economically disadvantaged persons and improve the functioning of our national economy, and

in order to utilize to the maximum extent possible Indian labor and the output of Indian businesses, the Bureau of Indian Affairs must negotiate these contracts with Indian contractors.

DETERMINATION

Based on the foregoing findings, I hereby determine that, independently of any other applicable exemption from the requirements of the Federal Property and Administrative Services Act of 1949, as amended (41 U.S.C. 251-260), it is impracticable, within the meaning of § 302(c)(10) of the said Act (41 U.S.C. 252(c)(10)), to secure competition by formal advertising in the procurement of the proposed class of contracts for supplies and services, and accordingly the Bureau of Indian Affairs may procure such supplies and services by negotiating with Indian contractors exclusive of non-Indian contractors, without complying with the advertising requirements of § 253 of the said Act (41 U.S.C. 253). This Determination shall not be utilized when the Commissioner or his designee determines that negotiations with Indian contractors would be inappropriate.

Date: Dec. 18, 1979

/s/ William E. Hallett
Commissioner of
Indian Affairs

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